

1 PAUL ANDRE (State Bar No. 196585)
2 pandre@kramerlevin.com
3 LISA KOBIALKA (State Bar No. 191404)
4 lkobialka@kramerlevin.com
5 JAMES HANNAH (State Bar No. 237978)
6 jhannah@kramerlevin.com
7 KRAMER LEVIN NAFTALIS & FRANKEL LLP
8 990 Marsh Road
9 Menlo Park, CA 94025
10 Telephone: (650) 752-1700
11 Facsimile: (650) 752-1800
12
13 *Attorneys for Plaintiff*
14 FINJAN, INC.

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14 FINJAN, INC., a Delaware Corporation,

15 Plaintiff,

16 v.

17 CISCO SYSTEMS, INC., a California
18 Corporation,

19 Defendant.

Case No.: 5:17-cv-00072-BLF

20 **PLAINTIFF FINJAN, INC.'S**
21 **OPPOSITION TO DEFENDANT CISCO**
22 **SYSTEMS, INC.'S MOTION TO DISMISS**
23 **FINJAN'S SECOND AMENDED**
24 **COMPLAINT REGARDING**
25 **WILLFULNESS**

26 Date: December 14, 2017

27 Time: 9:00 a.m.

28 Dept.: Courtroom 3, 5th Floor

Judge: Honorable Beth Labson Freeman

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF ISSUE TO BE DECIDED.....	2
III. FACTUAL BACKGROUND.....	2
A. Finjan Alleged in its SAC Cisco’s Pre-Suit Knowledge of Each Asserted Patent	2
B. Finjan Alleged in its SAC Detailed Allegations of Cisco’s Egregious Conduct.....	6
IV. ARGUMENT	8
A. The Court May Not Weigh Documents Subject to Judicial Notice To Determine Willfulness At This Early Pleading Stage	8
B. The Detailed Allegations of Cisco’s Pre-Suit Knowledge of the Asserted Patents in Finjan’s SAC Are Sufficient to Plead Willfulness	11
C. The Detailed Allegations of Cisco’s Egregious Conduct in Finjsn’s SAC Are Sufficient to Plead Willfulness	15
D. In the Alternative, Finjan Should Be Allowed to Amend the Complaint.....	19
V. CONCLUSION.....	19

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Avocet Sports Tech., Inc. v. Garmin Int'l, Inc.</i> , No. C 11-04049 JW, 2012 WL 2343163 (N.D. Cal. June 5, 2012).....	13
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	9
<i>Blitzsafe Texas, LLC v. Volkswagen Group of Am., Inc.</i> , Nos. 2:15-cv-1274-JRG-RSP, 2:15-cv-1278-JRG-RSP, 2016 WL 4778699 (E.D. Tex. Aug. 19, 2016)	13
<i>Brodsky v. Yahoo! Inc.</i> , 630 F. Supp. 2d 1104 (N.D. Cal. 2009)	10
<i>CG Tech. Dev., LLC v. FanDuel, Inc.</i> , No. 2:16-CV-00801-RCJ-VCF, 2017 WL 58572 (D. Nev. Jan. 4, 2017)	16
<i>CG Tech. Dev., LLC v. Zynga, Inc.</i> , No. 2:16-CV-00859-RCJ-VCF, 2017 WL 662489 (D. Nev. Feb. 17, 2017).....	16
<i>Conservation Force v. Salazar</i> , 646 F.3d 1240 (9th Cir. 2011)	8
<i>Cont'l Circuits LLC v. Intel Corp.</i> , No. CV16-2026 PHX DGC, 2017 WL 2651709 (D. Ariz. June 19, 2017)	19
<i>Elm 3DS Innovations, LLC v. Samsung Elecs. Co.</i> , No. 14-1430-LPS-CJB, 2015 WL 5725768 (D. Del. Sept. 29, 2015)	13
<i>Finjan, Inc. v. ESET, LLC</i> , No. 3:17-CV-0183-CAB-(BGS), 2017 WL 1063475 (S.D. Cal. Mar. 21, 2017).....	13
<i>Halo Elecs., Inc. v. Pulse Elecs., Inc.</i> , 136 S. Ct. 1923 (2016).....	<i>passim</i>
<i>Hughes v. Experian Info. Sols., Inc.</i> , No. 15-CV-05118-BLF, 2016 WL 3670051 (N.D. Cal. July 11, 2016).....	19
<i>InterMetro Indus. Corp. v. Capsa Sols., LLC</i> , 50 F. Supp. 3d 657 (M.D. Pa. 2014)	15
<i>Irori Techs., Inc. v. Luminex Corp.</i> , No. 13-CV-2647-BEN (NLS), 2014 WL 769435 (S.D. Cal. Feb. 25, 2014)	13

1	<i>Lamont v. Time Warner, Inc.</i> ,	
2	No. CV 12-8030-CAS (VBKX, 2012).....	11
3	<i>In re LDK Solar Sec. Litig.</i> ,	
4	584 F. Supp. 2d 1230 (N.D. Cal. 2008)	10
5	<i>Longitude Licensing v. Apple, Inc.</i> ,	
6	No. C-14-04275-EDL, 2015 WL 1143071 (N.D. Cal. Mar. 13, 2015)	14
7	<i>Max Sound Corp. v. Google, Inc.</i> ,	
8	No. 5:14-CV-04412-EJD, 2015 WL 2251060 (N.D. Cal. May 13, 2015).....	10, 11
9	<i>McMahon v. Take-Two Interactive Software, Inc.</i> ,	
10	640 F. App'x 669 (9th Cir. 2016)	9
11	<i>McRo, Inc. v. Namco Bandaia Games Am., Inc.</i> ,	
12	23 F. Supp. 3d 1113 (C.D. Cal. 2013)	9
13	<i>Nanosys, Inc. v. QD Vision, Inc.</i> ,	
14	No. 16-CV-01957-YGR, 2016 WL 4943006 (N.D. Cal. Sept. 16, 2016)	18, 19
15	<i>Nanosys, Inc. v. QD Vision, Inc.</i> ,	
16	No. 16-CV-01957-YGR, 2017 WL 35511 (N.D. Cal. Jan. 4, 2017)	18
17	<i>OpenTV, Inc. v. Apple, Inc.</i> ,	
18	No. 14-cv-01622-HSG, 2015 WL 1535328 (N.D. Cal. Apr. 6, 2015)	14
19	<i>Oracle Am., Inc. v. Hewlett Packard Enter. Co.</i> ,	
20	No. 16-CV-01393-JST, 2017 WL 635291 (N.D. Cal. Feb. 16, 2017).....	11
21	<i>Potter Voice Techs., LLC v. Apple, Inc.</i> ,	
22	24 F. Supp. 3d 882 (N.D. Cal. 2014)	9, 10, 11
23	<i>Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.</i> ,	
24	No. 09-CV-05235-MMC, 2017 WL 130236 (N.D. Cal. Jan. 13, 2017).....	18
25	<i>Princeton Digital Image Corp. v. Ubisoft Entm't SA</i> ,	
26	No. 13-335-LPS-CJB, 2016 WL 6594076 (D. Del. Nov. 4, 2016)	16, 17
27	<i>Radware, Ltd. v. A10 Networks, Inc.</i> ,	
28	No. C-13-02021-RMW, 2014 WL 61047 (N.D. Cal. Jan. 7, 2014)	9, 10, 14
	<i>Radware, Ltd. v. F5 Networks, Inc.</i> ,	
	No. 5:13-CV-02024-RMW, 2016 WL 4427490 (N.D. Cal. Aug. 22, 2016).....	15
	<i>Raytheon Co. v. Cray, Inc.</i> ,	
	No. 2:16-CV-00423-JRG-RSP, 2017 WL 1362700 (E.D. Tex. Mar. 13, 2017)	13

1	<i>Seoul Laser Dieboard Sys. Co. v. Serviform, S.r.l.</i> ,	
2	957 F. Supp. 2d 1189 (S.D. Cal. 2013).....	13
3	<i>Spectrum Pharm., Inc v. Sandoz Inc.</i> ,	
4	No. 2:12-CV-00111-GMN-NJK, 2013 WL 5492667 (D. Nev. Sept. 30, 2013)	10
5	<i>Traffic Info., LLC v. Yahoo! Inc.</i> ,	
6	No. 2:09-CV-246-TJW-CE, 2010 WL 2545500 (E.D. Tex. Apr. 13, 2010)	9
7	<i>Varian Med. Sys., Inc. v. Elekta AB</i> ,	
8	No. CV 15-871-LPS, 2016 WL 3748772 (D. Del. July 12, 2016)	16
9	<i>Windy City Innovations, LLC v. Microsoft Corp.</i> ,	
10	193 F. Supp. 3d 1109 (N.D. Cal. 2016)	19

1 **I. INTRODUCTION**

2 Finjan's allegations in its Second Amended Complaint (Dkt. No. 55, the "SAC") are more than
3 sufficient to plead a claim for willful infringement. Finjan alleged detailed facts supporting Cisco's
4 knowledge of the Asserted Patents and egregious willful infringement. In doing so, Finjan specifically
5 addressed each deficiency identified in the Court's prior order, which permitted Finjan to amend its
6 willfulness allegations (Dkt. No. 44, the "Order").

7 For pre-suit knowledge of the Asserted Patents, Finjan alleged in its SAC specifically when and
8 how Cisco gained pre-suit knowledge of *each* individual Asserted Patent—not simply knowledge of a
9 patent portfolio broadly as Cisco falsely claims in its Motion. In fact, Finjan's SAC even referenced
10 specific documents Finjan produced in this litigation that indisputably provided notice to Cisco by
11 specifically identifying and describing each particular Asserted Patent. The Court may take judicial
12 notice of these documents to confirm their existence and that they refer to and describe the Asserted
13 Patents. At the same, contrary to Cisco's suggestion throughout its Motion, this judicial notice may
14 not be used to convert this motion to dismiss into a summary judgment motion of the ultimate
15 determination of Finjan's willfulness claim. Rather, to properly *plead* willfulness, Finjan need only
16 plead direct infringement coupled with "the barest factual assertion of knowledge" to avoid dismissal.
17 Finjan's SAC readily satisfies this standard.

18 For egregiousness, Finjan in its SAC alleged various facts showing the depth and extent of the
19 collaborative partnership between Finjan and Cisco for over twenty years, Cisco's admiration for
20 Finjan and its technology resulting in substantial investments in Finjan since 2004, Cisco's knowledge
21 of each Asserted Patent and Cisco's ultimate decision to betray its trust with Finjan by knowingly
22 acquiring and selling technology that infringed Finjan's patents. Finjan laid out in detail these factual
23 allegations regarding Cisco's specific intent and willful conduct for each Asserted Patent. These
24 allegations regarding Cisco's egregious conduct amply satisfy the flexible standard adopted by the
25 Supreme Court in *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933-35 (2016), which
26 considers the totality of the circumstances as opposed to rigid criteria for proving willfulness and
27 enhanced damages.

For the reasons explained further below, Cisco's motion should be denied.

II. STATEMENT OF ISSUE TO BE DECIDED

Whether Finjan's SAC alleges facts sufficient to state a claim for willful infringement.

III. FACTUAL BACKGROUND

Finjan filed its First Amended Complaint ("FAC") on March 27, 2017 (Dkt. No. 26), in which Finjan pled a cause of action for Cisco's willful infringement of the Asserted Patents.¹ The Court dismissed without prejudice Finjan's claim for willful infringement as set forth in Finjan's FAC on the grounds that Finjan failed to plead sufficient factual allegations that Cisco had pre-suit knowledge of the Asserted Patents and only included a conclusory allegation that Cisco's behavior was egregious. Order at 6-7. The Court granted Finjan leave to amend its pleading. *Id.* Finjan in its SAC corrected each deficiency identified by the Court by (i) specifically alleging separately for each Asserted Patent the date and manner by which Cisco obtained pre-suit knowledge; and (ii) including factual allegations demonstrating Cisco's subjective intent and egregious conduct in infringing the Asserted Patents.

A. Finjan Alleged in its SAC Cisco's Pre-Suit Knowledge of Each Asserted Patent

In finding Finjan's allegations regarding Cisco's pre-suit knowledge of the Asserted Patents insufficient in the FAC, the Court stated that Finjan's FAC alleged Cisco's general knowledge of

¹ Finjan's FAC reflects amendments to Finjan's factual allegations in support of its willfulness claim. In its original complaint, Finjan included allegations based in part on certain discussions between Finjan and Cisco that occurred after the parties entered into a Non-Disclosure Agreement in 2014 (the "NDA"). Dkt. No. 1 at ¶ 9. On March 6, 2017, Cisco filed its Answer and Counterclaims against Finjan, alleging, *inter alia*, a counterclaim for "breach of contract," claiming that Finjan's reliance on these discussions violated the NDA. Dkt. No. 24 at 19-21. However, this counterclaim did not state a plausible claim for relief because the NDA only restricted use of "Proprietary Information," and Finjan did not include any "Proprietary Information" in its complaint. For this reason, Finjan intended to seek to dismiss Cisco's breach of contract counterclaim under Rule 12(b)(6). Dkt. No. 35-1, Declaration of Benu Wells in Support of Finjan's Opposition to Cisco's Motion to Dismiss, ¶ 2. During the parties' meet and confer in advance of Finjan's anticipated motion to dismiss, it became apparent that the parties' dispute regarding the counterclaim could be resolved if Finjan provided different instances of notice to Cisco of Finjan's patents, as opposed to those based on discussions following the NDA. *Id.* Thus, while Finjan disputed Cisco's breach of contract claim, Finjan had various bases for its willfulness claim not limited to these discussions, and thus Finjan was willing to amend its complaint to reflect these other bases and avoid burdening the Court with a dispute over Cisco's counterclaim. *Id.* Accordingly, on March 27, 2017, Finjan filed the FAC removing all references to the NDA.

1 Finjan's patent portfolio, but failed to either tie that general knowledge to the Asserted Patents or to
2 allege that Cisco specifically learned of the Asserted Patents. Order at 6. The Court also found that
3 Finjan did not sufficiently include "the content of information exchanged" or the "dates" for the
4 interactions that would give rise to Cisco's knowledge. *Id.* In light of the Court's ruling, Finjan in its
5 SAC specifically alleged separately for each Asserted Patent the date and the content of the
6 information that Cisco received by which Cisco obtained pre-suit knowledge. Finjan also went a step
7 further by supporting its factual allegations with reference to specific documents, which Finjan
8 produced to Cisco, that confirm each of Finjan's allegations regarding Cisco's knowledge of each
9 Asserted Patent.

10 In particular, Finjan alleged that Cisco knew of the '844 Patent and Finjan's pending
11 application for the '780 Patent as early as June 2, 2004. SAC at ¶¶ 48, 65, and 83. Finjan supported
12 this allegation by referencing a Series D Preferred Stock Purchase Agreement (the "Series D Stock
13 Agreement") executed by the parties on that date. *Id.* As Finjan alleged in the SAC, this Series D
14 Stock Agreement specifically identified and described the '844 Patent and the application that resulted
15 in the '780 Patent. SAC at ¶¶ 48, 65 and 83; Dkt. No. 56-6, Declaration of Patrick S. Salceda in
16 Support of Cisco's Motion to Dismiss ("Salceda Decl."), Ex. C at ¶ 2.10.² The '844 Patent issued on
17 November 28, 2000 (SAC at ¶ 9; Dkt. No. 55-1 at 4 (Ex. 1 to SAC)), and Finjan filed the patent
18 application for the '780 Patent in March 2000, which issued in October 2004 (SAC at ¶ 12; Dkt. No.
19 55-2 at 2 (Ex. 2 to SAC)). Thus, Finjan adequately alleged that Cisco had knowledge of the '844
20 Patent and the application for the '780 Patent as early as June 2, 2004.

21 Finjan further alleged that Cisco had knowledge by November 14, 2008 of the '844 and '780
22 Patents, as well as the application that led to the '633 Patent, based on the parties' execution of a Series
23

24 ² The version of the Series D Stock Purchase Agreement Finjan produced does not include the
25 Schedule of Exceptions. However, because the '844 Patent issued on November 28, 2000, and the
26 '780 Patent application was filed in March 2000, the Schedule of Exceptions would have included both
27 the '844 Patent and the '780 Patent application. Finjan will endeavor during discovery to locate a
28 complete copy of the Schedule D Stock Purchase Agreement, including all schedules.

1 E Stock Purchase Agreement (the “Series E Stock Agreement”) on that date. SAC at ¶¶ 48, 65, 83 and
 2 102. Again, the Series E Stock Agreement specifically identified and described the ‘844 Patent (Dkt.
 3 No. 56-8, Salceda Decl., Ex. D at FINJAN-CISCO 121138), the ‘780 Patent (*id.* at FINJAN-CISCO
 4 121139) and the patent application for the ‘633 Patent, i.e., patent application 11/159,455 (*id.* at
 5 FINJAN-CISCO 121143; *see also* Dkt. No. 55-3 at 2 (Ex. 3 to SAC)). Finjan filed the application for
 6 the ‘633 Patent in June 2005, which issued as the ‘633 Patent in January 2010. *Id.* Thus, Finjan
 7 adequately alleged that Cisco had knowledge of the ‘844 and ‘780 Patents and the application for the
 8 ‘633 Patent as early as November 14, 2008.

9 Finjan alleged that Cisco had knowledge of the ‘633 and ‘154 Patents (as well as the ‘844 and
 10 ‘780 Patents) since at least on or about March 14, 2014, when Finjan Holdings, Inc. published its
 11 Annual Report for investors, which included Cisco. SAC at ¶¶ 50, 65, 83, 102, and 120. Finjan
 12 alleged Cisco has been a beneficial owner of Finjan Holdings, Inc.’s common stock, as well as holding
 13 voting power, since at least June 2013 when Finjan became a public company. *Id.* It is undisputed that
 14 the Annual Report (i) specifically identifies the asserted ‘844, ‘780, 633 and ‘154 Patents (Dkt. No. 57-
 15 2 at FINJAN-CISCO 123642-43); (ii) described each legal proceeding in which Finjan asserted the
 16 ‘844, ‘780, 633 and ‘154 Patents (*id.* at FINJAN-CISCO 123661; FINJAN-CISCO 123722); and (iii)
 17 confirms Cisco’s 7.5% ownership interest in Finjan (*id.* at FINJAN-CISCO 123694). Thus, Finjan
 18 adequately alleged that Cisco had knowledge of the ‘844, ‘780, ‘633 and ‘154 Patents by March 14,
 19 2014.

20 Finjan alleged that Cisco had knowledge of the ‘494 Patent (as well as the ‘844, ‘780, ‘633, and
 21 ‘154 Patents) since at least on or about May 8, 2014, when Finjan Holdings, Inc. published its
 22 Quarterly Report for investors, which included Cisco. SAC at ¶¶ 50 and 134. In addition to describing
 23 Cisco’s investment in Finjan, Finjan alleged that the Quarterly Report “specifically identified and
 24 described the pending lawsuits Finjan had filed against third parties for infringement of the ‘494 Patent
 25 and described the ‘494 Patent as follows:

26 On March 18, 2014, our subsidiary, Finjan, was issued a new U.S. patent
 27 (8,677,494) expiring in 2017 (the “494 Patent”). This patent relates to a
 28

proprietary malicious mobile code runtime monitoring systems and methods, designed to address potential network security threats through better recognition of malicious code segments passing through Internet infrastructure and networks to endpoint devices. The techniques described in the ‘494 Patent cover protection systems and methods offering security for one or more personal computers and/or other intermittently or persistently network accessible devices or processes. Specifically, the inventive aspects of the patent cover various defenses from undesirable or otherwise malicious operations of Java TN applets, ActiveX™ controls, JavaScript™ scripts, Visual Basic scripts, add-ins, and downloaded/uploaded programs which are often downloaded by users without considering the inherent security risks.”

Dkt. No. 57-3, Salceda Decl., Ex. B at 20. Thus, Finjan adequately alleged that Cisco had knowledge of the ‘844, ‘780, ‘633, ‘154 and ‘494 Patents by May 8, 2014.

In addition to the foregoing, Finjan included in the SAC further factual allegations of Cisco’s knowledge of the Asserted Patents. For example, Finjan alleged Cisco had pre-suit knowledge of the ‘844 and ‘780 Patents based on a December 2006 presentation Finjan gave to Cisco. SAC at ¶ 49. Finjan’s presentation to Cisco discussed Finjan’s patents and patent applications and described in detail the technology covered by the ‘844 and ‘780 Patents. *Id.* Indeed, the title of this presentation is “Introducing Finjan Vital Security,” which is the product that Finjan previously produced and sold that practiced claims of the ‘844, ‘780 and ‘633 Patents. Declaration of Benu Wells in Support of Finjan’s Opposition (“Wells Decl.”) filed herewith, Ex. 1, Finjan’s Infringement Contentions at 9. Thus, contrary to Cisco’s mischaracterization (Dkt. No. 56-4, Cisco’s Notice of Motion and Motion to Dismiss SAC (“Cisco Br.”) at 5-6), this presentation contains seventy-four pages detailing Finjan’s technology and products, which Finjan explicitly explained to Cisco was covered by its patents. *See, e.g.,* Dkt. No. 56-10, Salcedo Decl., Ex. E at FINJAN-CISCO 031359 (describing Finjan’s technology and number of issued and pending patents); *id.* at FINJAN-CISCO 031360 (describing Finjan’s patented behavior-based detection technology); *id.* at FINJAN-CISCO 031361 (detailing Finjan’s strong security related intellectual property and referencing the number of Finjan’s issued and pending patent applications). This presentation further supports Cisco’s pre-suit knowledge of the Asserted Patents because the focus of the presentation is on describing how Finjan’s patented technology complemented Cisco’s business. *See, e.g., id.* at FINJAN-CISCO 031367-031388.

Furthermore, Finjan alleged in the SAC that beginning in or around 2005, Cisco continuously sent an observer to Finjan's board of directors meetings during which Finjan's patents, technology and business strategy were discussed. SAC at ¶¶ 48, 49, 52, 65, 67, 83, 85, 104, 122, and 136. This observer, Yoav Samet, had a senior position at Cisco as Cisco's Vice President of Corporate Development. *Id.* at ¶¶ 49, 65, and 83. This allegation supports an inference of Cisco's pre-suit knowledge of the Asserted Patents based on Cisco's financial interest as an investor in Finjan, and associated presence at Finjan board meetings during which Finjan's patents and business strategies were discussed.

Thus, Finjan's allegations in the SAC of specific dates and context of Cisco's pre-suit knowledge of each individual Asserted Patent goes far beyond alleging the "barest factual assertions" that Cisco had knowledge of the Asserted Patents, which, as explained below, is all that is required to state a claim for willfulness.

B. Finjan Alleged in its SAC Detailed Allegations of Cisco's Egregious Conduct

In dismissing Finjan's willful infringement claim as set forth in Finjan's FAC, the Court also found that Finjan did not include sufficient allegations regarding Cisco's egregious conduct. The Court determined that Finjan included "no specific factual allegations about Cisco's subjective intent, or any other aspects of Cisco's behavior that would suggest its behavior was 'egregious.'" Order at 7. The Court stated: "The FAC simply makes the conclusory allegation that '[d]espite knowledge of Finjan's patent portfolio, Defendant has sold and continues to sell the accused products and services . . .'" *Id.* (citations omitted).

Importantly, the Court's analysis of Finjan's egregiousness allegations in the FAC did not address the sufficiency of any of the "four major touchpoints between the companies since 2000" in establishing Cisco's egregious conduct. *Id.* at 6. Rather, the entirety of the Court's analysis of these touchpoints related to whether Finjan's allegations in the FAC of the parties relationship could establish pre-suit knowledge of the Asserted Patents. *Id.* at 6-7. The Court based its determination that Finjan had failed to sufficiently allege egregiousness on the fact that Finjan had "simply made conclusory allegations of knowledge and infringement," which the Court found insufficient. *Id.* at 7.

1 In light of the Court's ruling, Finjan in the SAC amended its willfulness claim to include
 2 detailed factual allegations demonstrating Cisco's subjective intent and egregious conduct. Finjan
 3 alleged in detail the context of the parties' twenty-year relationship. SAC at ¶¶ 47-53. In particular,
 4 Finjan alleged that for over two decades the parties maintained an amicable relationship and
 5 consistently collaborated on cybersecurity. *Id.* at ¶ 47. Finjan further alleged that in the late 1990's,
 6 the parties entered into an original equipment manufacturer agreement that allowed Cisco to
 7 incorporate Finjan's technology into Cisco's products. *Id.* Cisco publicly acknowledged the value of
 8 Finjan's technology in a 1997 Fortune Magazine article wherein Cisco confirmed that its "discussions
 9 with Finjan brought it to the 'watershed decision' to include content inspection in its security
 10 products," and that Cisco has "very high regard for Finjan and its technology." *Id.*

11 Finjan went on to allege facts regarding each of Cisco's multiple and substantial investments in
 12 Finjan, Cisco's sending a representative to all Finjan board of directors meetings, Finjan's presentation
 13 to Cisco that discussed Finjan's patents and described in detail Finjan's technologies and products
 14 covered by certain of the Asserted Patents, and Cisco's 7.5% beneficial ownership in Finjan. *Id.* at
 15 ¶¶ 49-50. Finjan further alleged that despite Cisco's knowledge of Finjan's Asserted Patents and the
 16 technology covered by these patents, and despite a high likelihood that its actions constituted
 17 infringement of these patents, Cisco elected to undertake actions that infringed the Asserted Patents.
 18 *Id.* at ¶ 51. Specifically, Finjan alleged that Cisco acquired in or around October 2013 from
 19 Sourcefire, Inc. ("SourceFire") technology that infringes each of the Asserted Patents and integrated
 20 SourceFire's appliances and technology into Cisco's own product lines. *Id.* Finjan further alleged
 21 that, at least as early as March 2012, Cisco integrated into its products Outbreak Filters, which infringe
 22 the '154 Patent. *Id.*

23 Incorporating each of these factual allegations as context supporting Cisco's willful
 24 infringement, Finjan specifically alleged Cisco's egregious conduct as follows:

25 Cisco's infringement of the '844 Patent, '780 Patent, '633 Patent, '154
 26 Patent and '494 Patent is egregious. Cisco and Finjan had been in a long
 27 and extensive collaborative working relationship for almost twenty years
 28 during which Cisco had "very high regard for Finjan and its technology."

As described above, from at least as early as 2004 until 2014, Cisco gained knowledge of each of the Patents-in-Suit and the technology they cover. Based on information obtained from Finjan concerning Finjan's patents and technology, Cisco continuously invested in Finjan since at least as early as 2004. Finjan and Cisco maintained an amicable and collaborative relationship over the course of these years, in which Cisco's representative even attended multiple Finjan board meetings where Finjan's information, including its patents, technology and business strategy, was discussed. As such, Cisco recognized and valued Finjan's patents, including the '844 Patent, '780 Patent, '633 Patent, '154 Patent and '494 Patent, and it desired to have this patented technology incorporated into its own products and services. Thus, in violation of the relationship of trust and collaboration for approximately twenty years in which Cisco led Finjan to believe it was a partner, Cisco made the deliberate decision to acquire and to continue to sell products and services that it knew infringe Finjan's Patents-in-Suit.

Dkt. No. 55 at ¶¶ 52, 67, 85, 104, 122, and 136.

Finjan's factual allegations in the SAC specifically address Cisco's subjective intent in desiring to use Finjan's patented technology in its own products and services, and egregious behavior of availing itself to board meetings and presentations regarding Finjan's patents, technologies and business strategies by holding itself out as a partner of, and significant financial investor in, Finjan for over twenty years, only to thereafter proactively elect to infringe Finjan's Asserted Patents. Thus, Finjan's SAC addressed the issues identified by this Court's prior ruling and is more than adequate to plead a cause of action for willful infringement.

IV. ARGUMENT

A. The Court May Not Weigh Documents Subject to Judicial Notice To Determine Willfulness At This Early Pleading Stage.

The Court should reject Cisco's improper attempt to convert this motion to dismiss into a *de facto* motion for summary judgment through Cisco's request for judicial notice of documents Finjan referred to in its SAC. At the motion to dismiss stage, the Court's only inquiry is as to the sufficiency of Finjan's factual allegations. Order at 3 ("A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'") (citing *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quotation omitted). In analyzing the sufficiency of a party's pleading, the Court "does not undertake a full

1 evaluation of ‘probability,’ but simply asks for ‘more than sheer possibility that a defendant has acted
 2 unlawfully.’” *Potter Voice Techs., LLC v. Apple, Inc.*, 24 F. Supp. 3d 882, 887 (N.D. Cal. 2014)
 3 (rejecting defendant’s argument on a motion to dismiss that “go[es] to the weight of the evidence
 4 rather than the sufficiency of [the plaintiff’s] allegations”) (citation omitted).

5 “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond
 6 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to
 7 relief.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (citation omitted). In resolving
 8 Cisco’s motion to dismiss under Rule 12(b)(6), the court must accept Finjan’s allegations of material
 9 fact as true and construe them in a light most favorable to Finjan. *See McMahon v. Take-Two*
 10 *Interactive Software, Inc.*, 640 F. App’x 669, 671 (9th Cir. 2016) (reversing the district court’s
 11 decision for erring to construe plaintiff’s allegations in the light most favorable to plaintiffs); *Potter*
 12 *Voice Techs.*, 24 F. Supp. 3d at 887 (“With all of its allegations accepted as true, [plaintiff]
 13 demonstrates more than a sheer possibility that [defendant] was aware of the asserted patent.”).³

14 The Court may not weigh the sufficiency of Finjan’s evidence at the pleading stage pursuant to
 15 Cisco’s request for judicial notice. A court “generally may not look beyond the four corners of the
 16 complaint in ruling on a Rule 12(b)(6) motion, with the exception of documents incorporated into the
 17 complaint by reference, and any relevant matters subject to judicial notice.” *Radware, Ltd. v. A10*
 18 *Networks, Inc.*, No. C-13-02021-RMW, 2014 WL 61047, at *3 (N.D. Cal. Jan. 7, 2014) (citations

20 ³ Contrary to Cisco’s assertion, there is no basis for or benefit to resolving at the motion to dismiss
 21 stage the ultimate issue of whether will ultimately prevail on its willfulness claim. Cisco Br. at 8 n.4.
 22 The only case Cisco cites to support its argument is entirely inapposite. *McRo, Inc. v. Namco Bandaia*
 23 *Games Am., Inc.*, 23 F. Supp. 3d 1113, 1125 (C.D. Cal. 2013). The *McCro* decision addressed an issue
 24 not present here, namely whether a plaintiff must pursue a preliminary injunction when a willfulness
 25 allegations is based exclusively on post-suit knowledge. *Id.* The district court explicitly stated: “We
 26 are not here presented with a question of whether the claim contains sufficient factual detail. Instead,
 27 the question is whether the claim can exist under the circumstances present, where the alleged
 28 knowledge of the patent resulted only from the filing of the original complaint in the action and the
 plaintiff has not sought a preliminary injunction.” *Id.* at 1123. Thus, contrary to Cisco’s assertions,
 willfulness claims are not uniquely appropriate for dismissal under Rule 12(b)(6), but must be
 measured under the same plausibility standard as any other claim.

omitted). However, to the extent a court elects to take judicial notice of the existence of documents cited in a complaint, it is prohibited from making factual determinations as to the sufficiency of such evidence as to the final issues in the case. *Id.* at *3 (taking judicial notice of figures contained in prior art references but declining to evaluate the similarity of the figures for purposes of determining knowledge of an asserted patent on a motion to dismiss); *Max Sound Corp. v. Google, Inc.*, No. 5:14-CV-04412-EJD, 2015 WL 2251060, at *4 (N.D. Cal. May 13, 2015) (“While the Court takes judicial notice of the existence of the prosecution history, it declines to take judicial notice of Defendants’ interpretation of the documents.”); *Brodsky v. Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1111 (N.D. Cal. 2009) (a court may take judicial notice of the fact that statements were made on the dates specified, but not of the truth of the matters asserted therein); *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1254 (N.D. Cal. 2008) (taking judicial notice of statements made in SEC filings, but not for the truth of documents’ contents). To do so would improperly convert a motion for judicial notice into a motion for summary judgment. *Radware*, 2014 WL 61047, at *3 (dispute regarding sufficiency of plaintiff’s knowledge allegations involved “factual judgments [] better made by a jury, or at least at summary judgment upon consideration of evidence.”).

Here, the Court’s only concern at the Rule 12(b)(6) motion to dismiss stage is whether Finjan’s SAC alleges a plausible claim for willful infringement. Cisco cannot use its request for judicial notice as a mechanism for the Court to determine whether Finjan will ultimately prevail on its claim of willfulness based on a premature weighing of Finjan’s evidence alleged in the SAC and without the benefit of discovery. This is inconsistent with the applicable legal standard that the Court may only consider whether Finjan pled facts sufficient to state a plausible cause of action. *Id.* at *3 (stating it would be “improper” for court to make factual conclusions based on judicially noticed documents); *Potter Voice Techs.*, 24 F. Supp. 3d at 887 (declining to consider arguments on a motion to dismiss that required weighing of evidence as opposed to analysis of sufficiency of allegations); *Spectrum Pharm., Inc v. Sandoz Inc.*, No. 2:12-CV-00111-GMN-NJK, 2013 WL 5492667, at *3 (D. Nev. Sept. 30, 2013) (“[A]t the motion to dismiss stage, the Court does not weigh the alleged facts and consider whether

Defendant will ultimately prevail on this cause of action. The Court need only determine, assuming the alleged facts as true, whether the Amended Answer establishes a plausible [defense].”).

As demonstrated in the following sections, Finjan adequately plead a plausible cause of action for willfulness, including detailed allegations of Cisco’s pre-suit knowledge of the Asserted Patents and egregious conduct. The Court may properly take judicial notice of documents referenced in Finjan’s SAC⁴, which undisputedly confirm Finjan’s allegations that Cisco had pre-suit knowledge of the Asserted Patents. Judicial notice, however, is limited to confirming the existence of these documents and their reference to Finjan’s Asserted Patents. The Court may not at this pleading stage use Cisco’s request for judicial notice to make factual determinations or weigh the evidence to finally determine Finjan’s willfulness claim

B. The Detailed Allegations of Cisco’s Pre-Suit Knowledge of the Asserted Patents in Finjan’s SAC Are Sufficient to Plead Willfulness.

Cisco’s motion to dismiss the SAC should be rejected outright because Finjan pled in the SAC—separately for each Asserted Patent—allegations of the specific date and manner that Cisco became aware of each Asserted Patent before this action was filed. Specifically, Finjan alleged Cisco had knowledge of each of the Asserted Patents as follows:

- Cisco knew of the ‘844 Patent and Finjan’s pending application for the ‘780 Patent as early as June 2, 2004 based on the parties’ Series D Stock Agreement (SAC at ¶¶ 48, 65, and 83);
- Cisco knew of the ‘844 and ‘780 Patents, as well as the application that led to the ‘633 Patent, by November 14, 2008 based on the parties’ Series E Stock Agreement (*id.* at ¶¶ 48, 65, 83, and 102);

⁴ However, Finjan’s presentation to Cisco and the parties’ stock purchase agreements, which are not public documents and Cisco’s characterization of which is subject to reasonable dispute, are not the type of the documents courts typically find proper for judicial notice. *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-CV-01393-JST, 2017 WL 635291, at *2 (N.D. Cal. Feb. 16, 2017) (declining to take judicial notice of deposition testimony which is not an established “fact”); *Lamont v. Time Warner, Inc.*, No. CV 12-8030-CAS (VBKX, 2012), WL 5248061, at *2 (C.D. Cal. Oct. 19, 2012) (declining to take judicial notice of non-public, uncertified or unverified documents); *Max Sound Corp.*, 2015 WL 2251060, at *4 (declining to take judicial notice of defendants’ interpretation of judicially noticed documents).

- 1 ▪ Cisco knew of the ‘633 and ‘154 Patents (as well as the ‘844 and ‘780 Patents) since at least on
2 or about March 14, 2014, when Finjan Holdings, Inc. published its Annual Report for investors,
3 which included Cisco (*id.* at ¶¶ 50, 65, 83, 102, and 120); and
- 4 ▪ Cisco knew of the ‘494 Patent (as well as the ‘844, ‘780, ‘633, and ‘154 Patents) since at least
5 on or about May 8, 2014, when Finjan Holdings, Inc. published its Quarterly Report for
6 investors, which included Cisco (*id.* at ¶¶ 50 and 134).

7 As Finjan alleged in its SAC, these stock purchase agreements and investor reports specifically
8 identified and described the Asserted Patents. To the extent these documents are subject to judicial
9 notice, it is clear that this description of the Asserted Patents included their subject matter, inventor,
10 filing date, issue date, expiration date and a description of the legal proceedings in which the patent
11 was asserted. *See, e.g.*, Dkt. No. 57-2 at FINJAN-CISCO 123643, 123661 (annual report describing
12 the title, file date, issue date, expiration date and legal proceedings for certain Asserted Patents); Dkt.
13 No. 57-3 at 20, 27-31 (quarterly report including a description of the ‘494 Patent and legal proceedings
14 in which other patents were asserted); Dkt. No. 56-10, Salceda Decl., Ex. D, Series E Stock Agreement
15 at FINJAN-CISCO 031359-61 identifying the title, inventor, filing date and status for the Asserted
16 Patents). Moreover, Finjan alleged additional facts from which Cisco’s pre-suit knowledge of the
17 Asserted Patents may be inferred. Specifically, Finjan alleged Cisco had pre-suit knowledge of the
18 ‘844 and ‘780 Patents based on a December 2006 presentation Finjan gave to Cisco, which, to the
19 extent it is subject to judicial notice, includes seventy-four slides that informed Cisco of Finjan’s
20 patents, and described in detail the technology covered by the ‘844 and ‘780 Patents and Finjan’s Vital
21 Security products that practiced that technology. SAC at ¶ 49. Finjan further alleged in the SAC that
22 beginning in or around 2005, Cisco continuously sent its Vice President of Corporate Development to
23 observe Finjan’s board of directors meetings during which Finjan’s patents, technology and business
24 strategy were discussed. *Id.* at ¶¶ 48, 49, 52, 65, 67, 83, 85, 104, 122, and 136.

25 These allegations in Finjan’s SAC address each deficiency raised in the Court’s Order.
26 Specifically, Finjan “tie[d] [the] general knowledge of Finjan’s patent portfolio to the Asserted
27 Patents” and alleged how “Cisco specifically learned of the Asserted Patents” including “the content of
28 information exchanged” and the “dates” at which it was exchanged. Order at 6-7. Finjan did so in the
SAC by providing an account of when and how Cisco obtained knowledge separately for *each*

1 Asserted Patent, as well as the content of the information Cisco received, including Finjan's reference
 2 to documents supporting each factual allegation and other factual averments of circumstances
 3 indicative of Cisco's pre-suit knowledge.

4 These allegations go far beyond alleging the "barest factual assertions" that Cisco had
 5 knowledge of the Asserted Patents, which is all Finjan must do to state a claim for willfulness. Indeed,
 6 numerous cases, including post-*Halo* cases, recognize this is all that is required to adequately plead
 7 willfulness. *Seoul Laser Dieboard Sys. Co. v. Serviform, S.r.l.*, 957 F. Supp. 2d 1189, 1196-97 (S.D.
 8 Cal. 2013) (internal quotation and citation omitted); *see also Finjan, Inc. v. ESET, LLC*, No. 3:17-CV-
 9 0183-CAB-(BGS), 2017 WL 1063475, at *7 (S.D. Cal. Mar. 21, 2017) (denying to dismiss willful
 10 infringement claims based solely on the defendant's knowledge of the asserted patent because
 11 "[w]illfulness is measured by reference to the knowledge of the accused infringer at the time of the
 12 challenged conduct"), citing *Halo*, 136 S. Ct. at 1933; *Raytheon Co. v. Cray, Inc.*, No. 2:16-CV-00423-
 13 JRG-RSP, 2017 WL 1362700, at *5 (E.D. Tex. Mar. 13, 2017) ("Because [the plaintiff's] allegations
 14 concerning knowledge of the patents-in-suit are sufficient, a proper claim for willfulness has been
 15 made") (citation omitted)⁵; *Avocet Sports Tech., Inc. v. Garmin Int'l, Inc.*, No. C 11-04049 JW, 2012
 16 WL 2343163, at *3 (N.D. Cal. June 5, 2012) (finding "allegations make out the 'barest factual
 17 assertion' that [defendant] had knowledge of the patent at issue, which is sufficient to plead a claim for
 18 willful infringement") (citation omitted); *Elm 3DS Innovations, LLC v. Samsung Elecs. Co.*, No. 14-
 19 1430-LPS-CJB, 2015 WL 5725768, at *2 (D. Del. Sept. 29, 2015) (holding that it was plausible that
 20 defendant had pre-suit knowledge based on a presentation made to defendant regarding related patents
 21 and the fact that the patent-in-suit was well known in the semiconductor industry); *Irori Techs., Inc. v.*
 22 *Luminex Corp.*, No. 13-CV-2647-BEN (NLS), 2014 WL 769435, at *2 (S.D. Cal. Feb. 25, 2014)
 23 ("courts have denied motions to dismiss where the [plaintiff] couples an allegation of direct
 24 infringement with 'the barest factual assertion' of knowledge") (citation omitted); *Blitzsafe Texas, LLC*
 25

26 ⁵ Notably, *Raytheon Co.* found that even "[p]ost-complaint knowledge is sufficient under *Halo*" to state
 27 the claims of willful infringement. *Raytheon*, 2017 WL 1362700, at *5 (citation omitted).

1 *v. Volkswagen Group of Am., Inc.*, Nos. 2:15-cv-1274-JRG-RSP, 2:15-cv-1278-JRG-RSP, 2016 WL
 2 4778699, at *6 (E.D. Tex. Aug. 19, 2016) (denying motion to dismiss willful infringement claims and
 3 finding that accused infringer's knowledge of a patent application was all that was required).

4 Cisco's repeated arguments that the SAC is deficient because Finjan did not allege that Cisco
 5 copied Finjan or tie its allegations to Cisco's products are red herrings. *See, e.g.*, Cisco Br. at 4, 5, 14.
 6 Finjan is not required to allege these types of facts for willfulness, and tellingly, Cisco cites no
 7 authority that there is any such requirement. *Id.* Rather, the inquiry for pleading willfulness is whether
 8 Finjan pled Cisco's pre-suit knowledge ***of the Asserted Patents***, which Finjan more than adequately
 9 satisfied in the SAC. Cisco's regurgitated argument that Finjan's willfulness allegations are premised
 10 on knowledge of a patent portfolio as opposed a particular patent also fails because it is demonstrably
 11 false. Cisco Br. at 15. It is simply not the case that Finjan relies on knowledge of a "patent portfolio"
 12 in the SAC—rather Finjan provides a patent-by-patent account of when and how Cisco gained
 13 knowledge of each Asserted Patent. For the '844 and '780 Patents, Cisco provides no other argument
 14 disputing the adequacy of Finjan's allegations regarding Cisco's knowledge, and thus there can be no
 15 dispute that those allegations are sufficient. *Id.*

16 For the remaining patents (i.e., the '633, '154 and '494 Patents), contrary to Cisco's
 17 unsupported assertion, Finjan's public annual and quarterly reports to the SEC provided Cisco with
 18 knowledge for purposes of willful infringement. *Radware*, 2014 WL 61047, at *2 (finding pre-suit
 19 knowledge allegations premised, in part, on public documents sufficient to state a plausible claim for
 20 willfulness at the pleading stage). These reports indisputably make explicit reference to and describe
 21 the Asserted Patents and provide detail regarding litigations in which Finjan asserted these patents (*see*
 22 SAC at ¶¶ 50, 65, 83, 102, 120, and 134), and they also confirm Cisco's status as an investor in Finjan.
 23 Neither of the two cases Cisco cites (*id.* at 16) support its incorrect contention that the Court should
 24 simply ignore these reports. *See Longitude Licensing v. Apple, Inc.*, No. C-14-04275-EDL, 2015 WL
 25 1143071, at *3 (N.D. Cal. Mar. 13, 2015) (plaintiff's knowledge allegation limited to conclusory
 26 allegation that defendant had knowledge of patent portfolio prior to lawsuit and did not allege, as
 27 Finjan did here, that publicly filed statement to investors specifically identified patents in suit);
 28

1 *OpenTV, Inc. v. Apple, Inc.*, No. 14-cv-01622-HSG, 2015 WL 1535328, at * 7 (N.D. Cal. Apr. 6,
2 2015) (only allegation of pre-suit knowledge was that defendant would have knowledge of entire
3 patent portfolio of plaintiff's parent company).

4 Importantly, while Cisco attempts to discount Finjan's annual and quarterly reports because
5 they were "public," Cisco was not merely part of the general public with respect to these reports.
6 Cisco had a unique status as an investor in Finjan for over twenty-years, and at the time of the reports,
7 Cisco owned 7.5% of Finjan's common stock as one of just a small number of companies that invested
8 in Finjan. Dkt. No. 57-2, Salceda Decl, Ex. A at FINJAN-CISCO 123694.⁶ These quarterly and
9 annual reports were distributed for the purpose of updating these investors, including Cisco, as to the
10 status of Finjan's business. At a minimum, it is reasonable to infer that Cisco received and reviewed
11 these reports as Finjan's investor and therefore had knowledge of the '633, '154 and '494 Patents.
12 Thus, the SAC sets forth ample factual allegations to support Cisco's knowledge of the Asserted
13 Patents.

14 **C. The Detailed Allegations of Cisco's Egregious Conduct in Finjan's SAC Are**
15 **Sufficient to Plead Willfulness.**

16 Cisco's argument that Finjan failed to plead egregious conduct for purposes of willful
17 infringement is spurious. As this Court recognized in its Order, "under *Halo*, willfulness is not a
18 prerequisite to awarding enhanced damages, nor are enhanced damages required upon a finding of
19 willfulness." Order at 4 (citations omitted). Rather, willful infringement typifies egregious conduct
20 that would justify an award of enhanced damages. *Id.* ("However, enhanced damages are generally
21 reserved for 'egregious cases of misconduct beyond typical infringement,' such as those 'typified by

22 ⁶ Cisco's citation to *Radware, Ltd. v. F5 Networks, Inc.*, is inapposite because that case involved the
23 dismissal of a willfulness claim after a jury trial, not on a motion to dismiss at the pleading stage under
24 Rule 12(b)(6). No. 5:13-CV-02024-RMW, 2016 WL 4427490, at *4-5 (N.D. Cal. Aug. 22, 2016)
25 (granting judgment as a matter of law of no willful infringement after jury trial and direct testimony
26 that no one at defendant ever reviewed a press release plaintiff relied on to establish defendant's
27 knowledge that a patent had issued). Similarly, *InterMetro Indus. Corp. v. Capsa Sols., LLC* does not
28 support Cisco's argument because it is a pre-*Halo* and out-of-district decision where litigation, not the
asserted patents, was discussed in press releases and an article with no allegation defendant was an
investor in plaintiff, as Cisco is here. 50 F. Supp. 3d 657, 666 (M.D. Pa. 2014).

willful misconduct.”) (citation omitted). Indeed, the Supreme Court’s *Halo* decision lowered the bar to prove willfulness, eliminating the requirement that the infringer must have acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. *Halo*, 136 S. Ct. at 1933-35. Thus, it is sufficient to show that the risk of infringement was either known to the accused infringer or so obvious that it should have been known. *Id.*

The cases Cisco cites wherein a party’s egregiousness allegations were found insufficient (Cisco Br. at 10 n.5) are largely not controlling and do not support Cisco’s argument because, unlike Finjan’s detailed factual allegations here, the parties in those cases merely recited the legal standard followed by a conclusory statement that defendant’s conduct was egregious. *Varian Med. Sys., Inc. v. Elekta AB*, No. CV 15-871-LPS, 2016 WL 3748772, at *8 (D. Del. July 12, 2016) (“Plaintiff does little more than provide a formulaic recitation of the pre-*Halo* elements of a willful infringement claim.”); *CG Tech. Dev., LLC v. Zynga, Inc.*, No. 2:16-CV-00859-RCJ-VCF, 2017 WL 662489, at *4 (D. Nev. Feb. 17, 2017) (plaintiff “simply made the conclusory allegations” of knowledge and awareness); *CG Tech. Dev., LLC v. FanDuel, Inc.*, No. 2:16-CV-00801-RCJ-VCF, 2017 WL 58572, at *6 (D. Nev. Jan. 4, 2017) (plaintiff’s conclusory statement that defendants knowledge and continued sale of infringing products constitute egregious conduct is insufficient); *Princeton Digital Image Corp. v. Ubisoft Entm’t SA*, No. 13-335-LPS-CJB, 2016 WL 6594076, at *11 (D. Del. Nov. 4, 2016) (plaintiff failed to allege knowledge of the asserted patent).

Here, Finjan went to great lengths to specifically address each issue raised in the Court’s prior order, and amended its willfulness claim in the SAC to include detailed factual allegations demonstrating Cisco’s subjective intent and egregious conduct. Finjan first set forth numerous allegations detailing the parties’ twenty-year relationship, including the parties’ consistent collaboration on cybersecurity; the execution of an OEM agreement that allowed Cisco to incorporate Finjan’s technology into Cisco’s products; Cisco’s public acknowledgment of the value of Finjan’s technology; Cisco’s multiple and substantial investments in Finjan; a senior Cisco representative’s ongoing attendance at Finjan board of directors meetings; Finjan’s presentation to Cisco that discussed

1 Finjan's patents and described in detail Finjan's technologies and products covered by certain of the
2 Asserted Patents; and Cisco's 7.5% beneficial ownership in Finjan. SAC at ¶¶ 47-50.

3 Finjan further alleged that despite Cisco's knowledge of Finjan's Asserted Patents and the
4 technology covered by these patents, and despite a high likelihood that its actions constituted
5 infringement of these patents, Cisco elected to undertake actions that infringed the Asserted Patents.
6 *Id.* at ¶ 51. Specifically, Finjan alleged that Cisco acquired technology from SourceFire that infringes
7 each of the Asserted Patents and integrated SourceFire's appliances and technology into Cisco's own
8 product lines, as well as integrated into its products Outbreak Filters that infringe the '154 Patent. *Id.*

9 Finjan incorporated each of these factual allegations as context supporting its specific
10 allegation of Cisco's willful infringement and egregious conduct. SAC at ¶¶ 52, 67, 85, 104, 122, and
11 136. In particular, Finjan included factual allegations of Cisco's subjective intent recognizing the value
12 and importance of Finjan's technology and desiring to use Finjan's patented technology in its own
13 products and services. Finjan alleged Cisco acted on this intent through egregious behavior, including
14 availing itself to Finjan's board meetings and presentations regarding Finjan's patents, technologies
15 and business strategies by holding itself out as a partner of, and significant investor in, Finjan for over
16 twenty years, only to proactively acquire technology from third-parties and proceed to sell products
17 that Cisco knew infringed Finjan's Asserted Patents. Indeed, Finjan's allegations show that Cisco was
18 benefiting from its investment in and relationship with Finjan while simultaneously knowingly
19 violating Finjan's patent rights by selling infringing products. Thus, Finjan's SAC addressed the
20 issues identified by this Court's prior ruling concerning egregiousness and adequately pleads a cause of
21 action for willful infringement.

22 Cisco distorts the Court's prior ruling on Finjan's willfulness allegation and, in particular, the
23 Court's analysis of the "four major touchpoints between the companies since 2000." Order at 6. The
24 Court analyzed these touchpoints in connection with its analysis of Finjan's allegations regarding
25 Cisco's pre-suit knowledge, not Finjan's allegations of egregious conduct. *Id.* This distinction is
26 important because the Court never ruled, as Cisco incorrectly contends, that these touchpoints do not
27 support Cisco's egregious conduct. Rather, the Court found Finjan's allegation of willfulness in its
28

1 FAC insufficient because it did not address Cisco's egregious behavior at all, but consisted of a
 2 conclusory sentence that Cisco continued to sell the accused products despite knowledge of Finjan's
 3 patent portfolio. *Id.* at 7.

4 Finjan cured this deficiency in its SAC by including factual allegations specifically directed
 5 toward Cisco's egregious conduct, including Cisco's knowledge of each of the Asserted Patents, the
 6 parties' two-decade long collaborative relationship, and Cisco's egregious conduct in obtaining
 7 strategic information regarding Finjan's patents, technologies and business strategies by attending
 8 Finjan's board meetings only to then turn around and violate the parties' relationship of trust and
 9 collaboration by deliberately acquiring and selling products and services that Cisco knew infringed
 10 Finjan's patents.

11 There is also no merit to Cisco's argument that the Court may not consider each of Finjan's
 12 allegations of egregious conduct in combination to determine whether Cisco's infringement was willful
 13 and egregious. Cisco Br. at 14-15. The Supreme Court in *Halo* adopted a flexible approach to
 14 determining whether a court should award enhanced damages: "As with any exercise of discretion,
 15 courts should continue to take into account the particular circumstances of each case in deciding
 16 whether to award damages, and in what amount. . . . [S]uch punishment should generally be reserved
 17 for egregious cases typified by willful misconduct." *Id.* at 1933-34; *see also Nanosys, Inc. v. QD*
 18 *Vision, Inc.*, No. 16-CV-01957-YGR, 2017 WL 35511, at *1 (N.D. Cal. Jan. 4, 2017) (applying Halo's
 19 totality of circumstance approach and finding patentee's allegations of willfulness sufficient). Courts
 20 in this District routinely find that a combination of events is sufficient for a finding of willfulness.
 21 *Nanosys, Inc. v. QD Vision, Inc.*, No. 16-CV-01957-YGR, 2016 WL 4943006, at *7 (N.D. Cal. Sept.
 22 16, 2016) (the Court finds it should consider the totality of the allegations to determine whether a claim
 23 of willfulness is plausible.); *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, No. 09-
 24 CV-05235-MMC, 2017 WL 130236, at *3 (N.D. Cal. Jan. 13, 2017) (finding willfulness based on a
 25 combination of (1) awareness of asserted patents, (2) confirmation of validity of said patents upon
 26 reexamination, and (3) failure to perform an analysis of said patents).

Cisco misinterprets the single out-of-district case it relies upon to support its argument that factual allegations regarding the parties' prior relationship cannot state a plausible cause of action for willful infringement, namely *Cont'l Circuits LLC v. Intel Corp.*, No. CV16-2026 PHX DGC, 2017 WL 2651709, at *7 (D. Ariz. June 19, 2017). Cisco Br. at 14. In *Cont'l Circuits*, the District of Arizona explicitly stated that plaintiff failed to plead **any** allegations regarding egregiousness, instead taking the position that no such pleading is required. *Cont'l Circuits*, 2017 WL 2651709, at *7. The district court found that plaintiff "pled no facts" regarding egregious behavior, but instead merely added the word "egregious" to its conclusory allegations that defendant's conduct was willful. *Id.* at *8. Here, as explained above, Finjan included specific factual allegations of Cisco's specific intent to infringe the Asserted Patents and particular circumstances confirming Cisco's egregious conduct. Thus, Finjan has more than adequately plead allegations from which egregiousness of Cisco's actions can be found.

D. In the Alternative, Finjan Should Be Allowed to Amend the Complaint.

In the event that the Court determines that Finjan did not adequately plead willful infringement, Finjan requests leave to amend its Complaint to include additional allegations. *See Nanosys*, 2016 WL 4943006, at *7-8 (granting leave to amend willfulness claim); *see also Windy City Innovations, LLC v. Microsoft Corp.*, 193 F. Supp. 3d 1109, 1117 (N.D. Cal. 2016) (same); *Hughes v. Experian Info. Sols., Inc.*, No. 15-CV-05118-BLF, 2016 WL 3670051, at *3 (N.D. Cal. July 11, 2016) (granting party third opportunity to amend complaint). Amendment is appropriate here because, as demonstrated above, Finjan established the plausibility of its claims.

V. CONCLUSION

For the reasons stated above, Finjan respectfully requests that the Court deny Cisco's motion to dismiss Finjan's willful infringement cause of action from the Second Amended Complaint.

///

///

///

Respectfully submitted,

DATED: August 4, 2017

By: /s/ Lisa Kobialka
Paul J. Andre (State Bar. No. 196585)
Lisa Kobialka (State Bar No. 191404)
James Hannah (State Bar No. 237978)
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
990 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 752-1700
Facsimile: (650) 752-1800
pandre@kramerlevin.com
lkobialka@kramerlevin.com
jhannah@kramerlevin.com

Attorneys for Plaintiff
FINJAN, INC.